

1999

Evan O. Koller v. F. Burke Godfrey, B. Lamont Godfrey, and Burke's Utah Land and Livestock, LLC: Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS
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CKET NO. 980215

EVAN O. KOLLER,

Plaintiff-Appellant,

vs.

F. BURKE GODFREY, B. LAMONT
GODFREY and BURKE'S UTAH LAND
AND LIVESTOCK, LLC, a Utah Limited
Liability Company,

Defendants-Appellees.

Priority No. 15

Case No. 980215

APPELLANT'S BRIEF

(Oral Argument Requested)

On Appeal from the First Judicial District Court,
Cache County, State of Utah
Honorable Gordon J. Low, District Court Judge
Civil No. 920000118

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES AND STANDARD OF REVIEW	1
ISSUES.....	1
STANDARD OF REVIEW.....	1
DETERMINATIVE STATUTES.....	2
STATEMENT OF THE CASE	2
INTRODUCTION.....	2
STATEMENT OF FACTS	5
<u>The Section 12 Boundary Line and Right-of-Way</u>	5
<u>The Section 18 County Access Road</u>	12
MARSHALLING THE EVIDENCE	14
SUMMARY OF ARGUMENT	14
ARGUMENT	16
I. THE TRIAL COURT ERRED WHEN IT FAILED TO RECOGNIZE THE BOUNDARY LINE AS IDENTIFIED IN THE APPLICABLE DEEDS.....	16
II. FURTHERMORE, EVEN IF THE TRIAL COURT DID NOT ERR, THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE TRIAL COURT’S DETERMINATION OF THE SECTION 12 PROPERTY BOUNDARY LINE	18
A. The Deeds Transferred the Relevant Property in Prorated Fashion.....	18
B. Witness Testimony Supports the Survey Results of Mr. Crow and Mr. Keith Hansen that the Boundary is the 16 th Section Line	20

C.	Godfrey Did Not Allege Boundary by Acquiescence at Trial, and Even if He Had, the Evidence Presented Fails to Establish the Necessary Elements	21
D.	The Court’s Determination of Boundary by Agreement is not Supported by Substantial Evidence	22
III.	THE TRIAL COURT’S DETERMINATION THAT NO PUBLIC RIGHT-OF-WAY EXISTS ALONG THE SIXTEENTH LINE OF THE SECTION 12 PROPERTY LACKS SUFFICIENT EVIDENCE.....	22
IV.	THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE TRIAL COURT CONCLUSION THAT NO COUNTY ROAD EXISTS ALONG THE WESTERN EDGE OF THE WEST SIDE OF THE SECTION 18 PROPERTY.....	24
A.	The Evidence Showed a County Road along the West Edge of Section 18 ...	25
B.	The Trial Court Abused its Discretion when It Failed to Continue the Trial so Don Anderson Could Testify Regarding the Section 18 County Road	27
	CONCLUSION	29
	REQUEST FOR ORAL ARGUMENT	29

TABLE OF AUTHORITIES

Prior Related Appeals

There are no prior or related appeals.

Cases

<i>Gillmor v. Cummings</i> , 904 P.2d 703 (Utah App. 1995).....	1
<i>Hancock v. Planned Development Corp.</i> , 791 P.2d 183 (Utah 1990).....	2
<i>Holbrook v. Master Protection Corp.</i> , 883 P.2d 295 (Utah App. 1994).....	2, 28
<i>Jacobs v. Hafen</i> , 917 P.2d 1078 (Utah 1996)	21
<i>Page v. Utah Home Fire Ins. Co.</i> , 15 Utah 2d 257, 391 P.2d 290 (Utah 1964)).....	2, 28
<i>Slattery v. Covey & Co.</i> , 857 P.2d 243 (Utah App. 1993).....	14
<i>Staker v. Ainsworth</i> , 785 P.2d 417 (Utah 1990)	22
<i>State v. Pena</i> , 869 P.2d 932 (Utah 1994)	1

Rules

Utah R. Civ. P. 40(b).....	2, 28
Utah R. Civ. P. 45(h).....	2, 28
Utah R. Evid. 803(20)	27

Statutes

Utah Code Ann. § 72-5-104	2
Utah Code Ann. § 72-5-105	2, 24, 27
Utah Code Ann. § 78-2a-3(2)(j).....	1

List of Attachments

1. Area Diagram
2. Relevant Statutes and Rules
3. Trial Court Findings of Fact and Conclusions of Law; Judgment and Decree

STATEMENT OF JURISDICTION

This court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

ISSUES

1. Did the trial court err when it failed to recognize the 16th Section line as the Section 12 boundary, and allowed extrinsic evidence to determine the boundary line?
2. If the trial court did not err, does sufficient evidence support the trial court's findings as to the Section 12 boundary?
3. Does sufficient evidence support the trial court's determination that no public right-of-way exists along the sixteenth line of the Section 12 Property?
4. Does sufficient evidence support the trial court's determination that a county road did not exist along the western boundary of the Section 18 Property thereby precluding Koller's traditional access to his property from the south?
5. Did the district court abuse its discretion when it failed to continue the trial so that Don Anderson could testify regarding the county road along the west edge of the Section 18 property?

STANDARD OF REVIEW

The interpretation of a deed, if it is unambiguous, is a question of law. *Gillmor v. Cummings*, 904 P.2d 703, 706 (Utah App. 1995). Questions of law are reviewed for correctness, giving no deference to the trial court. *State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

The trial court's findings of fact are reviewed under a clearly erroneous standard. *Gillmore v. Cummings*, 904 P.2d 703, 706 (Utah App. 1995); *Hancock v. Planned Development Corp.*, 791 P.2d 183, 185 (Utah 1990). The trial court's findings of fact are clearly erroneous if they are not supported by sufficient evidence. *Gillmore*, 904 P.2d at 706.

Finally, a district court's refusal to continue a trial is reviewed for an abuse of discretion. *Holbrook v. Master Protection Corp.*, 883 P.2d 295, 298 (Utah App. 1994); *see* Utah R. Civ. P. 40(b). "[I]n determining whether the trial court abused its discretion, this court must review the reasonableness of the trial court's decision, and should not disturb the decision unless it was 'clearly unreasonable and arbitrary.'" *Id.* at 299 (internal citations omitted) (quoting *Page v. Utah Home Fire Ins. Co.*, 15 Utah 2d 257, 391 P.2d 290, 293 (Utah 1964)).

DETERMINATIVE STATUTES

Utah Code Ann. § 72-5-104

Utah Code Ann. § 72-5-105

Utah R. Civ. P. 40(b)

Utah R. Civ. P. 45(h)

STATEMENT OF THE CASE

INTRODUCTION

Koller and Godfrey own adjoining dryland farms in northwest Cache County, Utah. These farms cover property that includes quite mountainous terrain. These farms are accessed through various county roads, public rights-of-way and private easements, very few of which are paved or maintained in great detail.

Koller bought the relevant property in 1967 from Lillie Thompson. One section (the “Section 12 Property”) comprises the southeast quarter of Section 12, Township 14 North, Range 2 West. Roughly, Godfrey owns the north half of the southeast quarter of Section 12, Koller owns the southeast quarter of the southeast quarter of Section 12 and a third party, Glen Thompson, owns the southwest quarter of the southeast quarter of Section 12.

In the northwest corner of the southeast quarter of the Koller Section 12 Property is a metal watering trough (in the shape of a very large barrel, cut in half lengthwise) that was used to water horses and cattle since the land was first homesteaded in the late 1800’s.

Since the settling of the Section 12 Property, the adjacent property owners and any members of the public could access that trough along a public right-of-way that travels east/west along the border between the Thompson property on the south and the Godfrey property on the north (the “Section 12 Right-of-Way”). For illustrative purposes only, a diagram of the property is attached as Attachment “1”.¹ The Section 12 Right-of-Way has never been abandoned. To the contrary, subsequent deeds of the various adjacent properties acknowledged and attempted to preserve it.

Furthermore, as illustrated on the drawing in Attachment “1”, Koller owns the northwest quarter of Section 18, Township 14 North, Range 1 West, Salt Lake Base and Meridian. Godfrey owns the southwest quarter of Section 18. Together, these properties constitute the Section 18 Property. Below Section 18 is Section 19. A county road (7200 West) runs north/south along the west edge of Section 19 by a residence owned by Don Anderson. Mr. Anderson’s residence is located in the southwest corner of Section 19

¹ In fact, this diagram was used by the court for illustrative purposes. (Record at 386—10-11).

(illustrated by three small squares in Attachment “1”). Since at least 1946, that county road (the “Section 18 County Access Road”) continued north along the west edge of the Section 19 Property and along the west side of the southwest quarter of the Section 18 Property. The county road ended at the midpoint line that divides the north and south halves of the Section 18 Property.

At various times since 1967, Koller accessed his Section 18 and adjoining property by way of this county road to haul out the wheat he farmed on his property. In some instances, given the nature of the terrain and the little to no formal maintenance of the county road, runoff water would flood the road and make it impassable. When the water drained, however, Koller once again used the county road.

The public, including Mr. Koller, enjoyed unobstructed access along both the Section 12 Right-of-Way and the Section 18 County Access Road until the late 1980’s, when Godfrey attempted to obstruct access along both properties and change the Section 12 Property line. This lawsuit followed. At trial, the district court ruled that the evidence did not support either a Section 12 Right-of-Way or the Section 18 County Access Road. Further, the district court changed the Section 12 boundary line so that it did not conform to the sixteenth line which divides the Godfrey property on the north from the Koller and Thompson property on the south.

Koller, through his trial counsel, filed a motion for a new trial based on additional evidence located after the trial of the matter. This motion sought to introduce language describing the Section 18 County Access Road which was located after trial in the microfiche

archives of the unpublished Utah Supreme Court decisions. The language from the decision reads as follows:

appellants filed an answer claiming a prescriptive right to travel along a roadway he averred was an established road which left his land where it adjoined respondents' eastern boundary and then crossed respondents' land in a general southwesterly direction to the southwest corner thereof where it entered a county highway extending in a northerly and southerly direction along the west side of respondents' property [Section 18 Property].

Koller's motion for a new trial was denied, and this appeal follows.

STATEMENT OF FACTS

The Section 12 Boundary Line and Right-of-Way

1. In 1897, Mary Jardine acquired the north half of the Section 12 Property from the United States government. The description of the property was prorated, meaning that it granted to Ms. Jardine literally the north half of the southeast quarter of Section 12. (Trial Record at 386—229, hereafter "Record").

2. In 1918, the northwest quarter of the southeast quarter of Section 12 was transferred to the Godfreys, but not using a prorated description. Instead, it was transferred using a metes and bounds description. (Record at 386—225-30).

3. Specifically, the transfer of the northwest quarter was done in the following manner:

Beginning 80 rods north and 80 rods west of the southeast corner of the southeast quarter of Section 12, Township 14 North, Range 2 West of the Salt Lake Base and Meridian running thence west 80 rods, thence north 80 rods, thence east 80 rods, thence south 80 rods.

(Record at 386—225-226).

4. The deeded description places the southern boundary of the Godfrey property 23 feet from the original boundary identified in the prorated deed. It places the boundary of the

Godfrey property 23 feet north of the 16th section line, the line that divides the north half of the southeast quarter of Section 12 from the south half of the southeast quarter of Section 12. (Record at 386—224-27; Pl.’s Trial Exhibit #1).

5. In 1935, the northeast quarter of the southeast quarter of Section 12 was transferred to Elmer Bingham. (Record at 386—114, 229-30; Deposition of Glen Thompson, dated February 17, 1993 at 6, published at Record at 387—475-76, hereafter “Thompson Dep.”; Pl.’s Trial Ex. # 103 at 2). Currently, it remains described in a prorated fashion, not in a metes and bounds fashion. (Record at 386—230). In fact, all of the properties surrounding the northwest quarter of the southeast quarter of Section 12 have all been transferred using prorated descriptions. (Record at 386—230).

6. In 1945, Kenneth and Peru Thompson, the owners of the southeast quarter of the southeast quarter of Section 12, transferred that sub-quarter, using a prorated deed, to Wendell Thompson. (Pl.’s Trial Ex. # 102 at 2). The deed also transferred “title and interest of grantors to a steel watering trough . . . said watering trough being situated in the Northwest corner of the Southeast quarter of said Section 12.” (Pl.’s Trial Ex. # 102 at 2).

7. In addition to identifying the trough inside the southeast quarter of the southeast quarter of Section 12, the deed also notes that the grant of interest to the trough was “subject . . . to all rights heretofore given to other persons to water stock at said steel watering trough, together with necessary rights of ingress and egress thereto.” (Pl.’s Trial Ex. # 102 at 2).

8. Two days before the transfer to Wendell Thompson, Kenneth and Peru Thompson granted to Glen W. Thompson access rights to the same steel trough. The language reads in relevant part:

The right to water livestock consisting principally of work animals at a steel watering trough situated in the Northwest corner of the Southeast Quarter of the Southeast Quarter of Section 12 . . . together with the right of ingress and egress to said steel watering trough for the purpose of carrying the right hereby granted into effect, it being understood and agreed that this right is not exclusive, but is to be exercised in connection with similar rights of other parties and subject to reasonable care to avoid unnecessary interference with the rights of other parties to a like service.

(Pl.'s Trial Ex. # 102 at 1).

9. Also in 1945, Koller purchased the property that includes Sections 7 & 8 of Township 14 North, Range 1 West. (*See* Attachment “1”; Record at 386—112-13). The western side of Section 7 is contiguous to the eastern side of Section 12. (Record at 386—113; Attachment “1”).

10. In 1967, Koller purchased the southeast quarter of the southeast quarter of Section 12 from Wendell Thompson. (Record at 386—107; Attachment “1”).

11. At the time Koller purchased the property, a road ran from the west side of the midline of the southeast quarter of Section 12 to the steel watering trough near the actual center of the southeast quarter of Section 12. (*See* App.'s Ex. #233, *see* Record at 386—106-107, 200). The trough was situated north to south, and was put in place in 1924 or 1926. (Thompson Dep. at 10).

12. On the east side of the watering trough, was a grain drill. (Record at 386—106-107; Ex. 233).

13. Just north of the northern end of the drill is where the boundary line had traditionally been that separates the Godfrey property on the north and the Koller property on the south. (Record at 386—105, 117; Ex. 231, 233). It constitutes the dividing line between the north and southern halves of the southeast quarter of Section 12 (identified as the 16th line),

and is located approximately 10 feet north of a square pipe that has been implanted near the northwestern edge of the southwest quarter of the southeast quarter of Section 12. (Record at 386—82, 116-119, 234-35; Ex. 231, 233).

14. There are remnants of a fence running east/west from the square pipe to a point approximately 10 feet west of the southern end of the steel trough, and Godfrey claims his property extends south to that fence line. (Record at 386—118-19, 223; Ex. 228, 230-33).

15. The result, however, is that Godfrey's claimed possession line is located nearly 10 feet south of the 16th line, and nearly 33 feet south of the line described in his deed's metes and bounds description. (Record at 386—238).

16. Approximately ten feet west of the steel trough was the boundary line that separates the Koller property on the east from the Thompson property on the west, thus placing the steel trough inside the Koller property, or the southeast quarter of the southeast quarter of Section 12. (Record at 386—116-17).

17. A fence ran north/south along the east edge of the southwest quarter of the southeast quarter of Section 12 (the Thompson property) and there was a gate in that fence just south of the steel trough so that the trough could be accessed from Thompson's property. (Thompson Dep. at 21).

18. The boundary line dividing the Godfrey and Koller properties in Section 12 was surveyed by Randy Lamarr Bott and his partner Don Williams, in approximately 1989. Mr. Bott was hired by Godfrey to settle the issue of the border between Koller and Godfrey on that Section 12 Property. (Record at 386—40, 46).

19. The last time Mr. Bott and Mr. Williams went to the property, they met both Koller and Godfrey at the “east terminus of the center, of the east/west center line of the southeast quarter of Section 12” at a railroad tie that had been implanted there. (Record at 386—48, 59). The railroad tie had been implanted at the east terminus of the middle of the southeast quarter of Section 12, and was agreed upon by both parties as the eastern dividing line between the north and south halves of the southeast quarter of Section 12. (Record at 386—60).

20. To arrive at the location, Godfrey, Mr. Bott and Mr. Williams drove east from 7300 West on a “roadway” that divided the Godfrey property on the north and the Thompson property on the south. (Record at 386—48-49). The roadway began from 7300 West on the west side of the southeast quarter of Section 12 and went easterly until it approached the steel watering trough and drill. It ran the length of the border dividing the Godfrey property on the north and the Thompson property on the south. (Record at 386—48-49, 71-72, Ex. 233, 227).

21. On a prior occasion, Mr. Bott and Mr. Williams had tied in their survey beginning point with the county survey, which was done by Preston Ward prior to that time. As a result, they located the section corner marker for the northeast corner of Section 12 and shot the line from that point south to where they were at the railroad tie. They were aided by a fairly well established fence that went north/south along the eastern edge of Section 12. (Record at 386—56-57). They determined that the railroad tie was not on the actual eastern edge of Section 12, but in fact, was west of that line. Nevertheless, they determined that the railroad tie was on the east/west line that divided the southeast quarter of the southeast quarter

of Section 12 from the northeast quarter of the southeast quarter of Section 12, and they determined that point to be the 16th Corner. (Record at 386—60-61, 73).

22. Mr. Bott opined that the county corner marker was a reliable marker from which to determine the relevant boundary. (Record at 386—76).

23. Once they tied the county corner marker to the railroad tie, Mr. Williams left the others and drove west along that east/west, 16th line into the southwest quarter of section 12. (Record at 386—62-68). Mr. Williams and Mr. Bott flagged various posts along the 16th line using their surveying equipment. (Record at 386—71-72, 116-117; Ex. 227).

24. Koller and Godfrey were the two to actually drive the posts into the ground. Mr. Bott then proceeded to place flags or ribbons on each post. (Record at 386—105-106, 116-117; Ex. 227, 228, 230, 231, 232, 233).

25. One post was placed just north of the steel trough, and was later replaced by Koller with a large telephone pole. (Record at 386—204-205). Koller placed the telephone pole at that location so that it could be identified from the east end of the 16th line, i.e., the railroad tie. The rolling hills located on the property made the various points along the 16th line impossible to see from one end to the other. (Record at 386—203).

26. The 16th line went from the railroad tie on the east to just north of the steel trough. At the trough point, the line was north of the fence that divided Godfrey and Thompson property. In other words, upon arriving just west of the steel trough, along the 16th line, a fence appeared to jog to the south about ten feet. (Record at 386—82, 116-117; Record at 387—460-61; Thompson Dep. at 9, 16-17; Ex. 231, 233). After jogging south about 10 feet, the fence then continues to the west until it connects with a square pipe that has been

implanted in the ground on the western edge of the southwest quarter of the southeast quarter of Section 12. (Record at 386—118-19, 245-46; Record at 387—263, 374; Thompson Dep. at 9, 55-56; Exhibit “3” of Thompson Dep.).

27. The line, including the flagged posts, as they were placed west of the steel trough, created a boundary line running parallel, approximately 10 feet north of the fence and square pipe. (Record at 386—118-19, 223, 245-46; 460-61, 409; Plaintiff’s Trial Exhibit #1). At the time, it was Koller’s understanding that the flagged property line constituted the boundary between the Koller and Thompson property on the south, and the Godfrey property on the north. (Record at 386—68, 119-20, Record at 387—460-61). In fact, Koller had farmed his property to that line since purchasing the property in 1967. (Record at 387—426-27).

28. Just west of the steel trough was a gate dividing the Thompson property on the South from the Godfrey property on the north. This gate was in existence at the time the Kollers purchased the Section 7 property in the 1940’s and was used by Koller to access his property on multiple occasions. (Record at 386—121-23; Record at 387—265, 285). On multiple occasions, Koller personally used the Section 12 Right-of-Way to reach a county road (7900 West), on the north side of the fence line that lined the north edge of the Thompson property. (Record at 386—122-23; Record at 387—456). Furthermore, it was used at various times by others to haul grain out of the Koller fields located east of the road. (Record at 386—124-26; Record at 387— 265, 285, 423, 455-56).

29. In fact, since the property was homesteaded, the public, including Ken Thompson, Glen Thompson, Sam Whitney and others, used the Section 12 Right-of-Way to

access the trough to water their horses and other animals, and to access a log home (originally owned and used year round by the Whitneys) that was located just east of southeast corner of Section 12. (Record at 386—122-23, 125-26, 140-141; Record at 387— 423, 456; Thompson Dep. at 11-12, 27, 36-37; Exhibit “1” of Thompson Dep.).

30. Access along the Section 12 right-of-way was never impeded until 1988 or 1989, when Godfrey tried to close access. (Record at 387—265, 443; Record at 388—588).

The Section 18 County Access Road

31. Also in 1967, Koller purchased the northwest quarter of Section 18, Township 14 North, Range 1 West. (Record at 386—113-14; Record at 387—445). He purchased this property from the estate of Wendell Thompson. (Record at 387—288). The Section 18 Property is contiguous to the southwest quarter of Koller’s Section 7 property. (*See* Attachment “1”).

32. The southwest quarter of Section 18 was originally owned by Don Anderson, until Godfrey purchased it some time in the late 1980’s or early 1990’s. (Record at 387—289). The Koller and Godfrey Section 18 properties are collectively referred to as the “Section 18 Property.” Below Section 18 is Section 19. The southwest quarter of Section 19 is owned by Don Anderson, and the southwest corner of the southwest quarter contains his resident homestead. (Record at 386—128; Record at 387—274-76; Pl.’s trial exhibit 328; *See* Attachment “1”).

33. Along the west edge of Section 19 is a county road (7200 West) that runs north/south. (Record at 386—129-130). When Koller bought the Section 18 Property in 1967, the road (7200 West) continued north from the northwest corner of Section 19, along the west

edge of the southwest quarter of Section 18 until it ended at the southwest corner of Koller's Section 18 Property (the road is referred to as the "Section 18 County Access Road". (Pl.'s Trial Ex. # 328 showing road from north to south down to Anderson residence on the east). It was Koller's and others' understanding that the entire section of road was a county road. (Record at 386—128-30; Record at 387—291; Record at 388—590).

34. Aerial photographs taken in 1946, 1959 and 1966 show how the county road, 7200 West, traveled north along the west side of Section 19 and up to the middle of the west edge of Section 18 where it ended at the beginning of the northwest quarter of Section 18 (Koller's property). (Record at 387—286-87, 289-93; Pl.'s Trial Ex. 10 & 12).

35. Furthermore, the trial judge noted, but would not receive, a county map which showed the same 7200 West road traveling north and ending at the Koller Section 18 Property. (Record at 387—330-31).

36. Koller and others used that road continuously since prior to 1967 for various reasons to gain ingress and egress to his portion of the Section 18 Property. It was a wide and fairly well-packed road. (Record at 386—132-33, 138-39; Record at 387—265, 281, 283, 285, 423, 457, 459).

37. In fact, when Koller purchased both the Section 12 and Section 18 properties, there were only two access routes, one along the Section 12 Right-of-Way, and one along the Section 18 County Access Road. (Record at 388—588).

38. Koller alleged at trial that Godfrey suddenly halted all access of ingress and egress through both the Section 12 Right-of-Way and the Section 18 County Access Road beginning in the late 1980's. This lawsuit was filed on August 11, 1992.

MARSHALLING THE EVIDENCE

When appealing a district court's factual determinations, the appellant must first marshal all the evidence in favor of the court's findings, and thereafter show why those findings are not supported by sufficient evidence. *See Slattery v. Covey & Co.*, 857 P.2d 243, 246 (Utah App. 1993). As most of the issues addressed below require that Koller marshal the evidence, it will be done in the Argument section in the order each applicable issue is addressed.

SUMMARY OF ARGUMENT

The unambiguous deeds to the northeast and southeast quarters of the southeast quarter of Section 12 transfer the property in a prorated fashion. They each transfer a quarter piece of the southeast quarter of Section 12. As such, the dividing line between the two properties is the section line which is identified as the 16th Section line. The trial court should have declared the 16th Section line to be the appropriate boundary, without referencing parole evidence. However, the trial court erred by looking beyond the unambiguous language of the deeds.

However, at trial, Godfrey argued that a fence constituted the boundary line. This fence allegedly ran from the east terminus of the 16th Section line straight in a southwesterly direction to a steel pipe that Godfrey's own surveyor agreed was ten feet south of the 16th line. Godfrey never claimed, nor presented evidence, of boundary by acquiescence or boundary by agreement. Nevertheless, the trial court erroneously concluded that this "fence" line constituted the appropriate boundary. Substantial evidence does not support the trial court's decision.

In addition, in the northwest corner of the southeast quarter of the southeast quarter of Section 12 is a large steel watering trough. At trial, Koller presented evidence that for years, a road ran east/west from the steel trough to the western edge of the southeast quarter of Section 12. This road was used by the public to access the watering trough with animals, as well as to access a homestead located southeast of the trough. No one disputed this evidence. Instead, Godfrey claimed that the roads had since been closed.

Utah law recognizes public rights-of-way over roads used by the public for at least ten years. This Section 12 Right-of-Way was used by the public for many more than ten years, and was never abandoned. Utah law further provides that a public right-of-way continues until formally abandoned by the proper authorities. The Section 12 Right-of-Way was never abandoned. As a result, it continues to this day regardless of Godfrey's attempt to farm over it. The trial court determined that no public right-of-way exists along the Section 12 Right-of-Way. Substantial evidence does not support the courts finding.

Finally, Koller presented evidence at trial that a county road exists along the western edge of the Section 18 Property. This Section 18 County Access Road, which is a northern extension of 7200 West that ends where the Koller Section 18 Property begins, was evidenced through aerial photographs, a county map, and testimony by Koller.

In addition, on the second day of trial, Koller intended to call Don Anderson as a witness regarding the Section 18 County Access Road. Neither party subpoenaed Mr. Anderson. However, Godfrey listed him as a "will call" witness, and Koller had confirmed his attendance by telephone. Also, Godfrey's counsel represented to Koller's trial counsel that Godfrey would call Mr. Anderson as a witness. Koller relied on that representation.

Mr. Anderson appeared in court to testify. Yet, after waiting in the courthouse for some time, during one of the breaks, counsel for Godfrey spoke with Mr. Anderson, and thereafter Mr. Anderson left the building. Koller was unable to locate him.

Koller informed the trial court that Mr. Anderson was a key witness regarding the Section 18 County Access Road, but the trial court would not continue the trial so that Mr. Anderson could testify. The trial court abused its discretion in failing to do so.

In summary, the trial court erred in its determination as to the Section 12 Property boundary, and substantial evidence does not support the court's factual findings respecting the Section 12 Right-of-Way and the Section 18 County Access Road. Furthermore, the trial court abused its discretion when it failed to continue the trial so that Mr. Anderson could testify regarding the Section 18 County Access Road. The Court should vacate the judgment of the trial court and remand the case for a new trial.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT FAILED TO RECOGNIZE THE BOUNDARY LINE AS IDENTIFIED IN THE APPLICABLE DEEDS.

The district court erroneously found that the points marked as ABC on Defendants' Exhibit "1" constituted the boundary line between the Godfrey property on the north and the Koller property on the south in the southeast quarter of the southeast quarter of Section 12. (Record at 304). Specifically, the trial court found:

25. There is a square pipe imbedded in the ground at approximately Point A on Defendants' Exhibit No. 1. This square pipe replaced a wooden post in the exact same location and the post and pipe in succession have been in the present location of the square pipe for more than [sic] eight (80) years last past.

26. The square pipe at Point A on Defendants' Exhibit No. 1 marks the recognized boundary between the Northwest Corner of the Clark Property and the Southwest Corner of the Godfrey Section 12 Property.

* * *

30. The Court finds that the ABC Fence line marks the historical and recognized boundary between the Godfrey Section 12 Property on the North and the Koller Section 12 and Clark Property on the South.

(Record at 304, 305).

The unambiguous deeds, however, demonstrate that the property line dividing the Godfrey and Koller properties in the southeast quarter of Section 12 is the 16th line that traveled straight from the railroad tie on the east to the west side of Section 12. This section line does not contain a “jog”, but rather is a straight line that crosses the middle of the southeast quarter of Section 12 and connects with the western edge of the southeast quarter of Section 12 approximately 10 feet north of the square pipe that constitutes “Point A” on appellees' trial Exhibit No. 1.

Godfrey never disputed that the Section 12 Property was originally granted by the United States government using references to the government's official survey. Koller acquired his portion of Section 12 by way of a prorated deed that transferred to him the southeast quarter of the southeast quarter of Section 12. (Record at 386—107; Pl.'s Ex. #101, ¶ 7). The deed is unambiguous. The north boundary line is the section line that divides the north half from the south half of the southeast quarter of Section 12. (Pl.'s Trial Ex. #101).

In addition, the deed granting the northeast quarter of the southeast quarter of Section 12 to Godfrey also uses a prorated deed. (Record at 386—230, Pl.'s Ex. #103 at 2). That

deed is also unambiguous. The south boundary line is the section line dividing the north half from the south half of the southeast quarter of Section 12. (Pl.'s Trial Ex. #103).

“If a deed description is unambiguous, its interpretation is a question of law.” *Gillmor v. Cummings*, 904 P.2d 703, 706 (Utah App. 1995). Furthermore, it will be interpreted without resorting to extrinsic evidence. *Id.*

Applied to the present case, as the unambiguous language of the deeds demonstrates, there is no question that the proper boundary between the Godfrey and Koller properties in Section 12 is the line dividing the northern from the southern half of the southeast quarter of Section 12, i.e. the 16th section line. The trial court erred when it failed to recognize the clear deed descriptions as designating the 16th section line as the boundary.

II. FURTHERMORE, EVEN IF THE TRIAL COURT DID NOT ERR, THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE TRIAL COURT'S DETERMINATION OF THE SECTION 12 PROPERTY BOUNDARY LINE.

A. The Deeds Transferred the Relevant Property in Prorated Fashion.

At trial, three surveyors testified regarding the location of the 16th section line. Two of the three (Wayne Crow and Keith Hansen) testified that the 16th section line traveled west from a railroad tie that was located on the east terminus of Section 12 and ended on the west side of the southeast quarter of Section 12 approximately ten feet north of a square pipe that was imbedded close to the west side of the southeast quarter of Section 12. (Record at 386—234-35; Record at 387—394).

The third surveyor, Randy Lamarr Bott, testified that the 16th line went from the railroad tie on the east, through the steel trough and to the square pipe on the west. (Record at 386—96). The problem with Mr. Bott's testimony, however, is that he could not recall much

of the events of his own survey. First, he admitted that he surveyed the property nine years before trial. He testified as to the events that took place, but only in the abstract. He testified that he marked the boundary, but could not recall what items he used to mark it. (Record at 386—66).

Second, when shown a photograph of the area, Mr. Bott could not recall with certainty any of the area or items shown in the picture. (Record at 386—79-80). Third, the results of his survey were never introduced at trial. Instead, he testified wholly from memory. In fact, when he was questioned regarding possible discrepancies between the 16th section line and the square pipe, he stated: “I can’t remember exactly because it didn’t seem like that there was a, a difference, a conflict in those points.” (Record at 386—96). The core of his testimony was that he could not really remember. (Record at 386—96-97).

Both Wayne Crow and Keith Hansen, on the other hand, placed the 16th line within one foot of each other and about ten feet north of the square pipe. (Record at 387—394; Record at 386—245-46). They performed their surveys more recently than did Mr. Bott, they were hired one by each of the parties to the case, and at least Mr. Crow’s actual survey results were admitted into evidence. This evidence, together with the deeds to the Godfrey and Koller properties in Section 12, unambiguously establish the dividing boundary at the 16th line.

The clear weight of the evidence placed that line from the railroad tie on the east to a point about ten feet north of the square pipe on the west. The trial court’s finding that the 16th line went from the railroad tie to the square pipe was clearly erroneous and not based on sufficient evidence. Thus, the Court should reverse the trial court’s findings as to the boundary between the Koller and Godfrey properties in Section 12.

B. Witness Testimony Supports the Survey Results of Mr. Crow and Mr. Keith Hansen that the Boundary Line is the 16th Section Line.

In addition to the deed and survey evidence, Glen Thompson testified (via published deposition) that many years ago, a fence began at the railroad tie, traveled west to the west side of the steel trough, then jogged south about ten feet, and continued west to the square pipe. (Thompson Dep. at 9, 16-17). Koller also testified of the jog in the fence line. (Record at 386—116-17). A ten-foot jog to the south in the fence line is inconsistent with a straight 16th section line. In other words, where the 16th line is a straight line, and to get from the railroad tie to the square post historically involved a jog to the south ten feet, the square pipe cannot possibly lie in line with the 16th section line.

Godfrey called three witnesses who testified that there was no “jog” in the fence line, but rather that the fence went straight from the railroad tie, over the middle of the steel trough, and to the square pipe. (Record at 387—344-45; Record at 388— 490, 526). These witnesses were Godfrey himself, his son Lamont, and his brother-in-law Dee Hansen. (Record at 387—337; Record at 388—490, 526). This testimony does not establish, however, where the 16th line is, but rather the alleged position of a fence, which Godfrey alleges to constitute the property line. Even assuming Godfrey’s claim that the fence line went straight from the railroad tie to the square pipe is true, it does not establish the fence line as the 16th line, and to the extent that it does not conform to the 16th line, it cannot constitute the correct boundary. Such a finding would place the 16th section line diagonally in a southwesterly direction. Instead, the 16th line, as established in the deeds and determined by those qualified to identify it, constitutes the correct boundary.

C. Godfrey did not Allege Boundary by Acquiescence at Trial, and even if He had, the Evidence Presented Fails to Establish the Necessary Elements.

The trial court found that the fence line constituted the boundary between the Koller and Godfrey Section 12 properties, a finding directly contrary to the unambiguous deed descriptions. The trial court's findings of fact and conclusions of law further suggest boundary by acquiescence in establishing the relevant boundary. (Record at 303-305). However, Godfrey never alleged boundary by acquiescence at trial, and furthermore failed to present sufficient evidence to establish it.

First, the trial court merged all pleadings into a final pretrial order. (Record at 225). The Pretrial Order makes absolutely no mention of any claim by Godfrey for boundary by acquiescence. (See Record at 224-26). More important, Godfrey made no mention of it at trial. Second, even if such were properly pleaded, Godfrey did not present sufficient evidence to establish that the ABC fence line constitutes a boundary by acquiescence.

To establish a boundary by acquiescence, Godfrey must show:

(i) occupation up to a visible line marked by monuments, fences, or buildings, (ii) mutual acquiescence in the line as a boundary, (iii) for a period of at least 20 years, (iv) by adjoining landowners.

Jacobs v. Hafen, 917 P.2d 1078, 1081 (Utah 1996). Godfrey failed to present sufficient evidence of boundary by acquiescence. In fact, he did not even attempt to put on evidence of any of the four required elements. As a result, the trial court's finding was clearly erroneous when it determined the boundary to be located on the ABC line instead of the 16th Section line.

D. The Court's Determination of Boundary by Agreement is not Supported by Substantial Evidence.

Finally, the trial court found that Koller and Godfrey “agreed” to the ABC boundary line as the boundary between the Godfrey and Koller Section 12 properties. (Record at 305-306). The evidence does not support such a finding.

A boundary by agreement, like any other contract, requires consideration. *See Staker v. Ainsworth*, 785 P.2d 417, 423 n.4 (Utah 1990). Here, however, Godfrey did not put on any evidence of consideration. Koller consistently claimed that the boundary line was the 16th Section line as provided for in the deeds. (Record at 386—105, 117). Thus, no evidence supports the trial courts finding that the parties somehow agreed upon the ABC line as the appropriate section line. The Court should reverse the trial court's finding in this regard.

III. THE TRIAL COURT'S DETERMINATION THAT NO PUBLIC RIGHT-OF-WAY EXISTS ALONG THE SIXTEENTH LINE OF THE SECTION 12 PROPERTY LACKS SUFFICIENT EVIDENCE.

The trial court found no evidence to support Koller's claim that a public right-of-way exists across the southern boarder of the northwest quarter of the southeast quarter of Section 12. (Record at 307). Dee Hansen testified that he cultivated the northwest quarter of the southeast quarter of Section 12 down to the fence line that constitutes the AB line on Defendants Exhibit #1 from 1964 on. (Record at 387—at 346). Furthermore, he testified that he had never seen Koller travel across the Section 12 right-of-way until the lawsuit was filed. (Record at 387—349). Dee Hansen further testified that Koller never hauled grain over the Section 12 right-of-way. (Record at 387—350).

Godfrey's son, Burke Lamont Godfrey, also testified that before the lawsuit was filed, he never saw Koller use the Section 12 right-of-way. Furthermore, he testified that previous to

the lawsuit, there were no tracks whatsoever along the Section 12 right-of-way. (Record at 388—495-96). A. Burke Godfrey himself also testified that neither Koller, nor anyone before him ever traveled across the claimed Section 12 right-of-way.

However, it was undisputed that since the southeast quarter of the Section 12 property was homesteaded, the public accessed the steel trough as well as a homestead originally owned by the Whitneys by way of a road along the Section 12 Right-of-Way. (Record at 386—123, 125-26, 140-41; Record at 387—371-72). In fact, Godfrey admitted that the Section 12 right-of-way was used when the property was first homesteaded to access the Whitney homestead. (Record at 388—555-56). Godfrey and the other witnesses claimed that Koller did not use the Section 12 right-of-way, but none of those witnesses disputed the evidence that the Section 12 right-of-way was used for years and years previously, when the property was first homesteaded.

In fact, Godfrey himself admitted that the Section 12 right-of-way was used before Koller owned the property. He then claimed “They’re both closed today. They’ve been closed for, for a long time.” (Record at 388—556). Dee Hansen also admitted that in years past, it was his understanding that people used the right-of-way to water their horses and other animals at the steel trough.

Utah Code Ann. § 72-5-104 states “A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.” Furthermore, section 72-5-105 states: “All public highways once established shall continue to be highways until abandoned or vacated by order

of the highway authorities having jurisdiction over any highway, or by other competent authority.”

At trial no party disputed that when the Section 12 property was homesteaded, and for years afterward, the Whitneys and others used the Section 12 right-of-way to access a log home located east of the Section 12 property, and to water their animals at the steel trough. Thus, the trial court abused its discretion when it concluded that no right-of-way existed along the south boarder of the northwest quarter of the southeast quarter of Section 12.

Finally, no evidence was presented to suggest that the public right-of-way was ever abandoned by the appropriate authorities. Therefore, it continues to exist until appropriately abandoned, regardless of the testimony that Godfrey may have farmed over it. *See* Utah Code Ann. § 72-5-105. Substantial evidence does not support the trial court’s finding.

IV. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE TRIAL COURT’S CONCLUSION THAT NO COUNTY ROAD EXISTS ALONG THE WESTERN EDGE OF THE WEST SIDE OF THE SECTION 18 PROPERTY.

Respecting the Section 18 County Access Road, the trial court found:

39. Prior to the time that Koller acquired the Wendell Thompson Property in Section 18 Property, there was evidence of travel along the West boundary of the Godfrey Section 18 Property between Points G and E shown on Defendants’ Exhibit 1.

40. Koller acquired the Koller Section 18 Property in 1967.

41. Godfrey’s predecessor in ownership of the Godfrey Section 18 Property was Don Anderson (Anderson).

42. Within two (2) years after Koller acquired the Koller Section 18 Property, Anderson began cultivating up to the West line of the Godfrey Section 18 Property and obliterated any evidence of travel across the West boundary of the Godfrey Section 18 Property and has cultivated up to that line continuously every year until Godfrey acquired the property from Anderson and Godfrey has cultivated up to the West line of the Godfrey Section 18 Property each and every year since Godfrey acquired the Godfrey Section 18 Property up to the present time.

43. Koller has produced no evidence to establish the basis on which evidence of travel along the West portion of the Godfrey Section 18 Property occurred or was used prior to the time Koller acquired his Section 18 property. There is no evidence before the Court that there was any deeded, prescriptive or Cache County right to any easement along the G-F line on Defendants' Exhibit No. 1 across the Godfrey Section 18 Property between Points F and G on Defendants' Exhibit No. 1.

(Record at 307-308).

A. The Evidence Showed a County Road along the West Edge of Section 18.

At trial, Burke Lamont Godfrey testified that from 1969 or 1970 to the time of trial, he never saw a road along the west side of Section 18. (Record at 388—498). He testified that he cultivated the southeast quarter of Section 18 up to the west property line, and that until he had a confrontation with Koller, there were no tracks there. (Record at 388—499).

In addition, A. Burke Godfrey testified at trial that he had owned the southeast quarter of Section 18 for the last 4½ to 6 years, and that he had never seen a roadway across the Section 18 property. (Record at 388—539).

Dee Hansen testified that he owned the southeast quarter of Section 13, which property is contiguous (See Attachment "1") to the west side of Section 18, and that he was on the property every year for 33 years. (Record at 387—338, 340-41). Dee Hansen also testified that there was a road along the west side (which constitutes the FG line on Defendants' Exhibit "1" [the Section 18 County Access Road]) for one to three years after he purchased the property. (Record at 387—353, 367). After that time, the ground was farmed over the road to the fence on the west side. (Record at 387—354).

In sum, none of Godfrey's witnesses stated that there was no county road along the west side of Section 18. Instead, they stated that whatever road was there, Godfrey farmed

over. Koller himself admitted that he asked Don Anderson to plow up the road in the mid-eighties in order to control rye that was infesting the surrounding farms. (Record at 387—446). Godfrey’s evidence does not negate the existence of a county road.

On the other hand, evidence was introduced to show that a clear roadway existed along the Section 18 County Access Road, and that the roadway was in fact a county road. First, aerial photographs taken in 1946, 1959, and 1966 show how a county road, 7200 West, traveled north along the west side of Section 19 (See Attachment #1) and up to the middle of the west edge of Section 18. These photographs show a continuous county road traveling north along the west edge of Section 18 and ending at the southwest corner of the northwest quarter of Section 18; i.e. the Koller Section 18 property. (Record at 387—286-87, 289-93).

Second, the trial court acknowledged, but improperly would not receive, a county map which showed the same 7200 West road traveling north and ending at the southwest quarter of the Section 18 property. (Record at 387—330-31). Koller and others used that road continuously since before 1967 for various reasons to gain ingress and egress to the Section 18 Property. It was a wide and fairly well-packed road. (Record at 386—132-33, 138-39; Record at 387— 265, 281, 283, 285, 423, 455, 457, 459).

Third, Koller testified that it was his understanding that the roadway along Section 18 was a county road. (Record at 386—129-130; Record at 387—289-93; Record at 388—590). Godfrey’s counsel objected to Koller’s testimony regarding whether or not the road was a county road, and the judge originally sustained the objection. However, Koller’s testimony was not improper. Rule 803(20), Utah Rules of Evidence provides for the admission of testimony addressing “Reputation concerning boundaries or general history.” The rule states

the following not to be “excluded by the hearsay rule, even though the declarant is available as a witness”:

Reputation in a community arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

Utah R. Evid. 803(20).

No one questioned that Koller had been a resident of the area for many years. He was in a position to testify as to the customs and boundaries affecting the Section 18 Property. He testified that those in the area understood the road to be a county road, and he described the road as having the appearance of a county road. The trial judge improperly excluded his testimony regarding the Section 18 County Access Road.

Koller presented evidence to the trial court that the roadway along the Section 18 property was a county road. Godfrey did not present contrary evidence, but rather claimed that the parties plowed up the road. Such evidence, however, does not negate the fact that a county road existed. Farming over a county road does not make the road any less of a county road. Utah law clearly requires abandonment of the road by the proper authorities, which never took place in this case. *See* Utah Code Ann. § 72-5-105.

B. The Trial Court Abused its Discretion when It Failed to Continue the Trial so that Don Anderson Could Testify Regarding the Section 18 County Road.

At the second day of trial, Koller intended to call Don Anderson as a witness to testify that the Section 18 road was a county road. (Record at 387—416-20). At the time, Mr. Anderson had been listed as a “will call” witness by Godfrey. However, he had not been served with a subpoena from either party. (Record at 387—417-18). Koller had previously contacted Mr. Anderson by telephone and asked if he would be present at trial to testify as a

witness for Koller, which he agreed to do. Furthermore, trial counsel for Koller had previously contacted counsel for Godfrey and had been told by Godfrey's counsel that Mr. Anderson would be testifying for Godfrey. (Record at 387—420). Koller's trial counsel relied on that representation. (Record at 387—420).

Mr. Anderson appeared at trial, intending to testify. However, after having a conversation with Godfrey's counsel, Mr. Anderson left the courthouse and could not thereafter be located. When it came time for him to testify, Koller could not find him. As a result, Koller explained the dilemma to the trial court. The court acknowledged Koller's problem, but stated that it would stay on schedule with the trial. (Record at 387—416-20).

"Granting a motion to continue a trial is within the trial court's discretion." *Holbrook v. Master Protection Corp.*, 883 P.2d 295, 298 (Utah App. 1994); *see* Utah R. Civ. P. 40(b). Thus, "[I]n determining whether the trial court abused its discretion, this court must review the reasonableness of the trial court's decision, and should not disturb the decision unless it was "clearly unreasonable and arbitrary." *Id.* at 299 (quoting *Page v. Utah Home Fire Ins. Co.*, 15 Utah 2d 257, 391 P.2d 290, 293 (Utah 1964)) (internal citations omitted).

Here, it is true that neither party had subpoenaed Mr. Anderson. However, once Mr. Anderson was present in the courthouse, a subpoena became unnecessary. *See* Utah R. Civ. P. 45(h) ("A person present in court . . . may be required to testify in the same manner as if the person were in attendance upon a subpoena."). Godfrey's counsel had represented to Koller's trial counsel that Mr. Anderson would be present, and he was, in fact, present for some time in the courthouse. Koller relied on that representation, and further relied on the presence of Mr. Anderson.

Mr. Anderson was a key witness for Koller regarding the existence of a county road along the Section 18 property. When the trial court insisted in continuing the trial as scheduled, it eliminated crucial evidence from Koller's case. The trial court was unreasonable in this regard. The trial should not have closed the evidence and ruled on the case until Koller had a reasonable time to locate Mr. Anderson for testimony. Doing so unduly prejudiced Koller's case and this prejudice was clear error.

The trial court noted its concern with its busy docket. (Record at 387—417-18). However, it could have continued with the hearing of evidence and simply continued its findings until it had a chance to hear Mr. Anderson's testimony. Such a result would have preserved fairness in the proceedings and the search for truth without unduly burdening the court's busy docket. The trial court, accordingly, acted unreasonably and arbitrarily when it failed to allow Koller more time to locate and call Mr. Anderson as a witness.

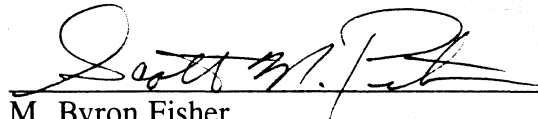
CONCLUSION

The trial court erred when it failed to recognize the 16th section line as the boundary between the Koller and Godfrey Section 12 property. Furthermore, substantial evidence does not support the trial court's findings that no right-of-way exists along the Section 12 Property and that no county road exists along the west edge of the Section 18 Property. For the foregoing reasons, the Court should vacate the trial court's findings of fact and remand for a new trial.

REQUEST FOR ORAL ARGUMENT

Koller requests oral argument in order to more fully explain his position and respond to questions of the Court regarding factual and legal issues.

DATED this 15th day of January, 1999.

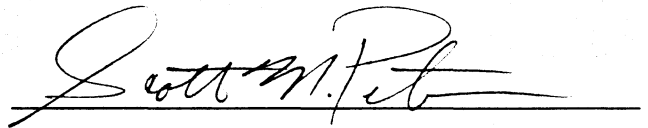


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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 1999, I caused to be mailed, first class, postage prepaid, two true and correct copies of the foregoing **APPELLEE'S BRIEF** to:

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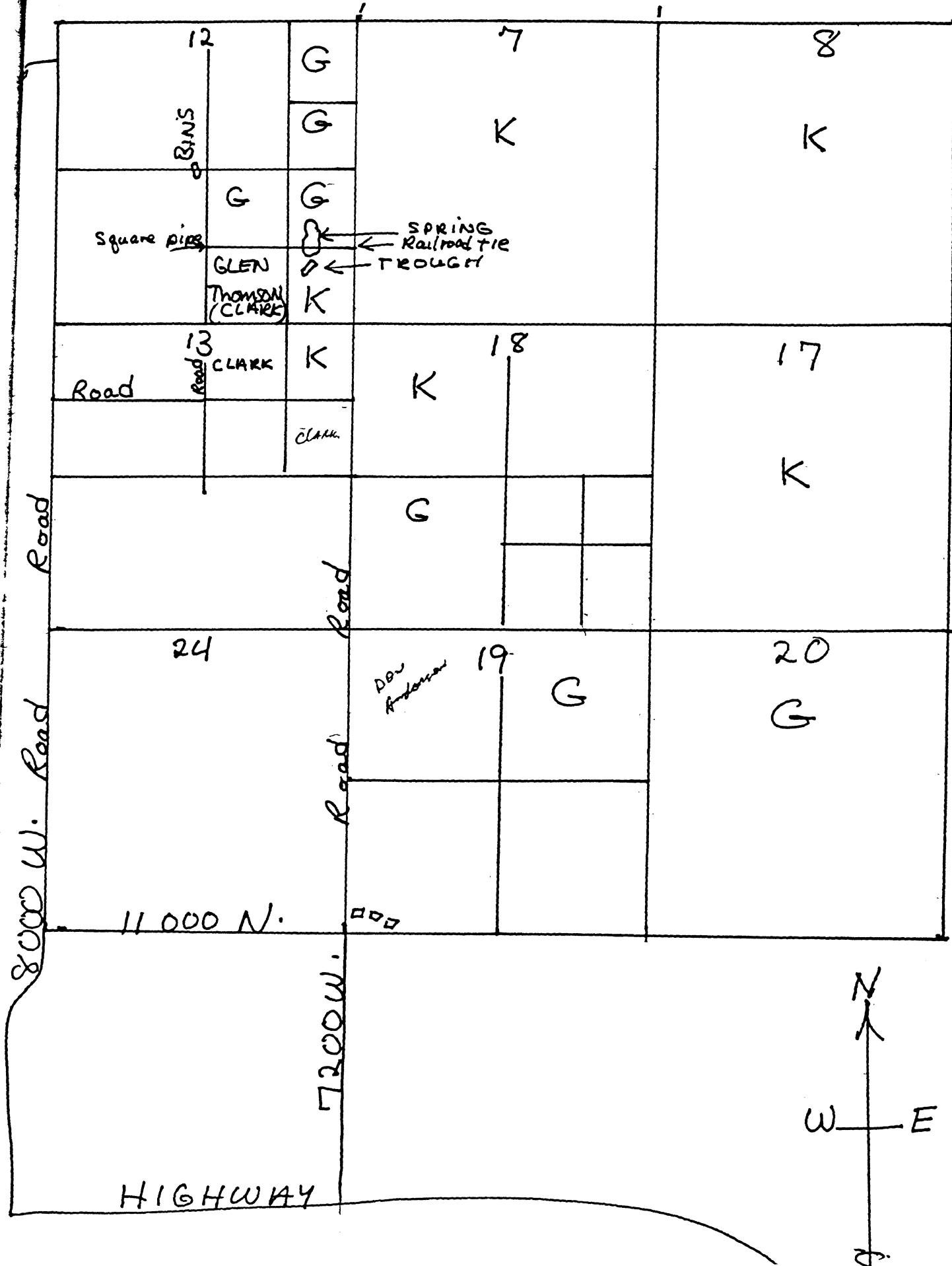
Tab 1

AREA DIAGRAM

T 14 N
R 2 W

T 14 N
R 1 W

AREA
DRAWING



Tab 2

RELEVANT STATUTES AND RULES

PART 1
PUBLIC HIGHWAYS

72-5-101. Title.

This chapter is known as the "Rights-of-way Act." 1996

72-5-102. Definitions.

As used in this part, "state highway purposes" includes:

- (1) rights-of-way, including those necessary for state highways within cities and towns;
- (2) the construction, reconstruction, relocation, improvement, and maintenance of the state highways and other highways, roads, and streets under the control of the department;
- (3) limited access facilities, including rights of access, air, light, and view and frontage and service roads to highways;
- (4) adequate drainage in connection with any highway, cut, fill, or channel change and the maintenance of any highway, cut, fill, or channel change;
- (5) weighing stations, shops, offices, storage buildings and yards, and road maintenance or construction sites;
- (6) road material sites, sites for the manufacture of road materials, and access roads to the sites;
- (7) the maintenance of an unobstructed view of any portion of a highway to promote the safety of the traveling public;
- (8) the placement of traffic signals, directional signs, and other signs, fences, curbs, barriers, and obstructions for the convenience of the traveling public;
- (9) the construction and maintenance of storm sewers, sidewalks, and highway illumination;
- (10) the construction and maintenance of livestock highways; and
- (11) the construction and maintenance of roadside rest areas adjacent to or near any highway. 1996

72-5-103. Acquisition of rights-of-way and other real property — Title to property acquired.

- (1) The department may acquire any real property or interests in real property necessary for temporary, present, or reasonable future state highway purposes by gift, agreement, exchange, purchase, condemnation, or otherwise.
- (2) Title to real property acquired by the department or the counties, cities, and towns by gift, agreement, exchange, purchase, condemnation, or otherwise for highway rights-of-way or other highway purposes may be in fee simple or any lesser estate or interest.
- (3) A transfer of land bounded by a highway on a right-of-way for which the public has only an easement passes the title of the person whose estate is transferred to the middle of the highway. 1996

72-5-104. Public use constituting dedication.

A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years. 1996

72-5-105. Highways once established continue until abandoned.

All public highways once established shall continue to be highways until abandoned or vacated by order of the highway authorities having jurisdiction over any highway, or by other competent authority. 1996

72-5-106. Expiration of franchise of toll bridge or road.

If the franchise of any toll bridge or road expires by limitation, forfeiture, or nonuser it is a free public highway, and no claim shall be valid against the public for right-of-way or for land or material comprising the bridge or road. 1996

72-5-107. United States patents — Patentee and county to assert claims to roads crossing land.

- (1) (a) If any person acquires title from the United States to any land in this state over which any public highway extends that has not been duly platted, and that has not been continuously used as a public highway for a period of ten years, the person shall within three months after receipt of the person's patent assert the person's claim for damages in writing to the county executive of the county in which the land is situated.
(b) The county legislative body shall have an additional period of three months in which to begin proceedings to condemn the land according to law.
- (2) (a) The highway shall continue open as a public highway during the periods described under Subsection (1).
(b) If no action is begun by the county executive within the period described under Subsection (1)(b), the highway shall be considered to be abandoned by the public.
- (3) In case of a failure by the person so acquiring title to public lands to assert his claim for damage during the three months from the time the person received a patent to the lands, the person shall thereafter be barred from asserting or recovering any damages by reason of the public highway, and the public highway shall remain open. 1996

72-5-108. Width of rights-of-way for public highways.

The width of rights-of-way for public highways shall be set as the highway authorities of the state, counties, or municipalities may determine for the highways under their respective jurisdiction. 1996

72-5-109. Contributions of property by counties and municipalities.

Counties and municipalities may contribute real or personal property to the department for state highway purposes. 1996

72-5-110. Acquisition of personal property.

The department may acquire by gift, agreement, exchange, purchase, or otherwise machinery, tools, equipment, materials, supplies, or other personal property necessary for the administration, construction, maintenance, and operation of the state highways, and may sell, exchange, or otherwise dispose of the machinery, tools, equipment, materials, supplies, and other personal property when no longer suitable or required for state highway purposes. 1996

72-5-111. Disposal of real property.

- (1) (a) If the department determines that any real property or interest in real property, acquired for a highway purpose, is no longer necessary for the purpose, the department may lease, sell, exchange, or otherwise dispose of the real property or interest in the real property.
(b) Real property may be sold at private or public sale and the proceeds of the sale shall be turned over to the state treasurer and credited to the Transportation Fund.
- (2) In the disposition of land at any private sale, first consideration may be given to the original grantor or his successor-in-interest.
- (3) Any sale, exchange, or disposal of real property or interest in real property made by the department pursuant to this section, is exempt from the mineral reservation provisions of Title 65A, Chapter 6, Mineral Leases, and any deed made and delivered by the department pursuant to this section without specific reservations in the deed is a conveyance of all the state's right, title, and interest in the real property or interest in the real property. 1996

72-5-112. Acquisition of real property from county, city, or other political subdivision — Exchange.

The department may purchase or otherwise acquire from any county, city, or other political subdivision of the state real

and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings. 1996

78-2a-4. Review of actions by Supreme Court.

Review of the judgments, orders, and decrees of the Court of Appeals shall be by petition for writ of certiorari to the Supreme Court. 1966

78-2a-5. Location of Court of Appeals.

The Court of Appeals has its principal location in Salt Lake City. The Court of Appeals may perform any of its functions in any location within the state. 1966

CHAPTER 3

DISTRICT COURTS

Section

78-3-1 to 78-3-2. Repealed.

78-3-3. Term of judges — Vacancy.

78-3-4. Jurisdiction — Appeals.

78-3-5. Repealed.

78-3-6. Terms — Minimum of once quarterly.

78-3-7 to 78-3-11. Repealed.

78-3-11.5. State District Court Administrative System.

78-3-12. Repealed.

78-3-12.5. Costs of system.

78-3-13. Repealed.

78-3-13.4. Transfer of court operating responsibilities — Facilities — Staff — Budget.

78-3-13.5, 78-3-14. Repealed.

78-3-14.2. District court case management.

78-3-14.5. Allocation of district court fees and forfeitures.

Section

78-3-15 to 78-3-17. Repealed.

78-3-17.5. Application of savings accruing to counties.

78-3-18. Judicial Administration Act — Short title.

78-3-19. Purpose of act.

78-3-20. Definitions.

78-3-21. Judicial Council — Creation — Members — Terms and election — Responsibilities — Reports.

78-3-21.5. Data bases for judicial boards.

78-3-22. Presiding officer — Compensation — Duties.

78-3-23. Administrator of the courts — Appointment — Qualifications — Salary.

78-3-24. Court administrator — Powers, duties, and responsibilities.

78-3-25. Assistants for administrator of the courts — Appointment of trial court executives.

78-3-26. Courts to provide information and statistical data to administrator of the courts.

78-3-27. Annual judicial conference.

78-3-28. Repealed.

78-3-29. Presiding judge — Associate presiding judge — Election — Term — Compensation — Powers — Duties.

78-3-30. Duties of the clerk of the district court.

78-3-31. Court commissioners — Qualifications — Appointment — Functions governed by rule.

78-3-1 to 78-3-2. Repealed.

1971, 1981, 1986

78-3-3. Term of judges — Vacancy.

Judges of the district courts shall be appointed initially until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office for judges of the district courts is six years, and commences on the first Monday in January, next following the date of election. A judge whose term expires may serve, upon request of the Judicial Council, until a successor is appointed and qualified. 1986

78-3-4. Jurisdiction — Appeals.

(1) The district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law.

(2) The district court judges may issue all extraordinary writs and other writs necessary to carry into effect their orders, judgments, and decrees.

(3) The district court has jurisdiction over matters of lawyer discipline consistent with the rules of the Supreme Court.

(4) The district court has jurisdiction over all matters properly filed in the circuit court prior to July 1, 1996.

(5) The district court has appellate jurisdiction to adjudicate trials de novo of the judgments of the justice court and of the small claims department of the district court.

(6) Appeals from the final orders, judgments, and decrees of the district court are under Sections 78-2-2 and 78-2a-3.

(7) The district court has jurisdiction to review agency adjudicative proceedings as set forth in Title 63, Chapter 46b, Administrative Procedures Act, and shall comply with the requirements of that chapter, in its review of agency adjudicative proceedings.

(8) Notwithstanding Subsection (1), the district court has subject matter jurisdiction in class B misdemeanors, class C misdemeanors, infractions, and violations of ordinances only if:

(a) there is no justice court with territorial jurisdiction;

(b) the matter was properly filed in the circuit court prior to July 1, 1996;

(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (e);

(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;

(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;

(i) appeals from the district court involving a conviction of a first degree or capital felony;

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction; and

(k) appeals from the district court of orders, judgments, or decrees ruling on legislative subpoenas.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

(a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;

(b) election and voting contests;

(c) reapportionment of election districts;

(d) retention or removal of public officers;

(e) matters involving legislative subpoenas; and

(f) those matters described in Subsections (3)(a) through (d).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Title 63, Chapter 46b, in its review of agency adjudicative proceedings. 1996

78-2-3. Repealed. 1986

78-2-4. Supreme Court — Rulemaking, judges pro tempore, and practice of law.

(1) The Supreme Court shall adopt rules of procedure and evidence for use in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the rules of procedure and evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature.

(2) Except as otherwise provided by the Utah Constitution, the Supreme Court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah.

(3) The Supreme Court shall by rule govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to the practice of law. 1986

78-2-5. Repealed. 1986

78-2-6. Appellate court administrator.

The appellate court administrator shall appoint clerks and support staff as necessary for the operation of the Supreme Court and the Court of Appeals. The duties of the clerks and support staff shall be established by the appellate court administrator, and powers established by rule of the Supreme Court. 1986

78-2-7. Repealed. 1986

78-2-7.5. Service of sheriff to court.

The court may at any time require the attendance and services of any sheriff in the state. 1986

78-2-8 to 78-2-14. Repealed. 1986, 1988

CHAPTER 2a

COURT OF APPEALS

Section

78-2a-1.

Creation — Seal.

78-2a-2.

Number of judges — Terms — Functions — Filing fees.

78-2a-3.

Court of Appeals jurisdiction.

78-2a-4.

Review of actions by Supreme Court.

78-2a-5.

Location of Court of Appeals.

78-2a-1. Creation — Seal.

There is created a court known as the Court of Appeals. The Court of Appeals is a court of record and shall have a seal. 1986

78-2a-2. Number of judges — Terms — Functions — Filing fees.

(1) The Court of Appeals consists of seven judges. The term of appointment to office as a judge of the Court of Appeals is until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office of a judge of the Court of Appeals is six years and commences on the first Monday in January, next following the date of election. A judge whose term expires may serve, upon request of the Judicial Council, until a successor is appointed and qualified. The presiding judge of the Court of Appeals shall receive as additional compensation \$1,000 per annum or fraction thereof for the period served.

(2) The Court of Appeals shall sit and render judgment in panels of three judges. Assignment to panels shall be by random rotation of all judges of the Court of Appeals. The Court of Appeals by rule shall provide for the selection of a chair for each panel. The Court of Appeals may not sit en banc.

(3) The judges of the Court of Appeals shall elect a presiding judge from among the members of the court by majority vote of all judges. The term of office of the presiding judge is two years and until a successor is elected. A presiding judge of the Court of Appeals may serve in that office no more than two successive terms. The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or incapacity of the presiding judge.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall:

(a) administer the rotation and scheduling of panels;

(b) act as liaison with the Supreme Court;

(c) call and preside over the meetings of the Court of Appeals; and

(d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court. 1986

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire

Rule 39. Trial by jury or by the court.

(a) *By jury.* When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the register of actions as a jury action. The trial of all issues so demanded shall be by jury, unless

(1) The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury, or

(2) The court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist, or

(3) Either party to the issue fails to appear at the trial.

(b) *By the court.* Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) *Advisory jury and trial by consent.* In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Rule 40. Assignment of cases for trial; continuance.

(a) *Order and precedence.* The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts may deem expedient. Precedence shall be given to actions entitled thereto by statute.

(b) *Postponement of the trial.* Upon motion of a party, the court may in its discretion, and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown. If the motion is made upon the ground of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it. The court may also require the party seeking the continuance to state, upon affidavit or under oath, the evidence he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it may be considered as actually given on the trial, or offered and excluded as improper, the trial shall not be postponed upon that ground.

(c) *Taking testimony of witnesses present.* If required by the adverse party, the court shall, as a condition to such postponement, proceed to have the testimony of any witness present taken, in the same manner as if at the trial; and the testimony so taken may be read on the trial with the same effect, and subject to the same objections that may be made with respect to a deposition under the provisions of Rule 32(c)(1) and (2) [Rule 32(c)(3)(A) and (B)].

Rule 41. Dismissal of actions.

(a) *Voluntary dismissal; effect thereof.*

(1) *By plaintiff.* Subject to the provisions of Rule 23(e), of Rule 66(i), and of any applicable statute, an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or other response to the complaint permitted under these rules. Unless otherwise stated in the notice of dismissal, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any

court of the United States or of any state an action based on or including the same claim.

(2) *By order of court.* Unless the plaintiff timely files a notice of dismissal under paragraph (1) of this subdivision of this rule, an action may only be dismissed at the request of the plaintiff on order of the court based either on:

(i) a stipulation of all of the parties who have appeared in the action; or

(ii) upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) *Involuntary dismissal; effect thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

(c) *Dismissal of counterclaim, cross-claim, or third-party claim.* The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to Paragraph (1) of Subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) *Costs of previously-dismissed action.* If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) *Bond or undertaking to be delivered to adverse party.* Should a party dismiss his complaint, counterclaim, cross-claim, or third-party claim, pursuant to Subdivision (a)(1)(i) above, after a provisional remedy has been allowed such party, the bond or undertaking filed in support of such provisional remedy must thereupon be delivered by the court to the adverse party against whom such provisional remedy was obtained.

Rule 42. Consolidation; separate trials.

(a) *Consolidation.* When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) *Separate trials.* The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any

separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

Rule 43. Evidence.

(a) *Form.* In all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. All evidence shall be admitted which is admissible under the Utah Rules of Evidence or other rules adopted by the Supreme Court.

(b) *Evidence on motions.* When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

Rule 44. Proof of official record.

(a) *Authentication of copy.* An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and in the absence of judicial knowledge or competent evidence, accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

(b) *Proof of lack of record.* A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

(c) *Other proof.* This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law.

(d) *Certified copy of record read in evidence.* A copy of any official record, or entry therein, in the custody of a public officer of this state, or of the United States, certified by the officer having custody thereof, to be a full, true and correct copy of the original in his custody, may be read in evidence in an action or proceeding in the courts of this state, in like manner and with like effect as the original could be if produced.

(e) *Official record defined.* As used in this rule "official record" shall mean all public writings, including laws, judicial records, all official documents, and public records of private writings.

(f) *Proof of the law of another state, territory or foreign country.* A printed copy of a statute, or other written law of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree or ordinance by the executive power thereof, contained in a book or publication purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the

existing law of the judicial tribunals thereof, is presumptive evidence of the statute, law, proclamation, edict, decree or ordinance. The unwritten or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of reports of cases adjudged in the courts thereof must also be admitted as presumptive evidence of the unwritten or common law thereof. The law of such state or territory or foreign country is to be determined by the court or master and included in the findings of the court or master or instructions to the jury, as the case may be. Such finding or instruction is subject to review. In determining such law, neither the trial court nor the Supreme Court shall be limited to the evidence produced on the trial by the parties, but may consult any of the written authorities above named in this subdivision, with the same force and effect as if the same had been admitted in evidence.

Rule 45. Subpoena.

(a) *Form; issuance.*

(1) Every subpoena shall:

(A) issue from the court in which the action is pending;

(B) state the title of the action, the name of the court from which it is issued, the name and address of the party or attorney serving the subpoena, and its civil action number;

(C) command each person to whom it is directed to appear to give testimony at trial, or at hearing, or at deposition, or to produce or to permit inspection and copying of documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of Notice to Persons Served with a Subpoena, in substantially similar form to Form 30 in the Appendix of Forms to these rules.

(2) A command to produce or to permit inspection and copying of documents or tangible things, or to permit inspection of premises, may be joined with a command to appear at trial, or at hearing, or at deposition, or may be issued separately.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney admitted to practice in the court in which the action is pending may also issue and sign a subpoena as an officer of the court.

(b) *Service; scope.*

(1) Generally.

(A) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made as provided in Rule 4(e) for the service of process and, if the person's appearance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States, or this state, or any officer or agency of either, fees and mileage need not be tendered. Prior notice of any commanded production or inspection of documents or tangible things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(B) Proof of service when necessary shall be made by filing with the clerk of the court from which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(C) Service of a subpoena outside of this state, for the taking of a deposition or production or inspection of documents or tangible things or inspection of premises outside this state, shall be made in accordance with the requirements of the jurisdiction in which such service is made.

(2) Subpoena for appearance at trial or hearing. A subpoena commanding a witness to appear at a trial or at a hearing pending in this state may be served at any place within the state.

(3) Subpoena for taking deposition.

(A) A person who resides in this state may be required to appear at deposition only in the county where the person resides, or is employed, or transacts business in person, or at such other place as the court may order. A person who does not reside in this state may be required to appear at deposition only in the county in this state where the person is served with a subpoena, or at such other place as the court may order.

(B) A subpoena commanding the appearance of a witness at a deposition may also command the person to whom it is directed to produce or to permit inspection and copying of documents or tangible things relating to any of the matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 30(b) and paragraph (c) of this rule.

(4) Subpoena for production or inspection of documents or tangible things or inspection of premises. A subpoena to command a person who is not a party to produce or to permit inspection and copying of documents or tangible things or to permit inspection of premises may be served at any time after commencement of the action. The scope and procedure shall comply with Rule 34, except that the person must be allowed at least 14 days to comply as stated in subparagraph (c)(2)(A) of this rule. The party serving the subpoena shall pay the reasonable cost of producing or copying the documents or tangible things. Upon the request of any other party and the payment of reasonable costs, the party serving the subpoena shall provide to the requesting party copies of all documents obtained in response to the subpoena.

(c) *Protection of persons subject to subpoenas.*

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court from which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A subpoena served upon a person who is not a party to produce or to permit inspection and copying of documents or tangible things or to permit inspection of premises, whether or not joined with a command to appear at trial, or at hearing, or at deposition, must allow the person at least 14 days after service to comply, unless a shorter time has been ordered by the court for good cause shown.

(B) A person commanded to produce or to permit inspection and copying of documents or tangible things or to permit inspection of premises need not appear in person at the place of production or inspection unless also commanded to appear at trial, at hearing, or at deposition.

(C) A person commanded to produce or to permit inspection and copying of documents or tangible things or inspection of premises may, before the time specified for compliance with the subpoena, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the documents or tangible things or inspection of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court from which a subpoena was issued shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance;

(ii) requires a resident of this state who is not a party to appear at deposition in a county in which the resident does not reside, or is not employed, or does not transact business in person; or requires a non-resident of this state to appear at deposition in a county other than the county in which the person was served;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies;

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information;

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party;

(iii) requires a resident of this state who is not a party to appear at deposition in a county in which the resident does not reside, or is not employed, or does not transact business in person; or

(iv) requires a non-resident of this state who is not a party to appear at deposition in a county other than the county in which the person was served;

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party serving the subpoena shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) *Duties in responding to subpoena.*

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(e) *Contempt.* Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to appear or produce at a place not within the limits provided by subparagraph (c)(3)(A)(ii).

(f) *Procedure where witness conceals himself or fails to attend.* If a witness evades service of a subpoena, or fails to attend after service of a subpoena, the court may issue a warrant to the sheriff of the county to arrest the witness and bring the witness before the court.

(g) *Procedure when witness is confined in jail.* If the witness is a prisoner confined in a jail or prison within the state, an order for examination in the prison upon deposition or, in the discretion of the court, for temporary removal and production before the court or officer for the purpose of being orally examined, may be made upon motion, with or without notice, by a justice of the Supreme Court, or by the district court of the county in which the action is pending.

(h) *Subpoena unnecessary; when.* A person present in court, or before a judicial officer, may be required to testify in the same manner as if the person were in attendance upon a subpoena.

have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any, the witness' deposition may be taken by any party, and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) *Compensation* Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the Fifth Amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court direct, and thereafter charged in like manner as other costs.

(c) *Disclosure of appointment* In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) *Parties' experts of own selection* Nothing in this rule limits the parties in calling expert witnesses of their own selection.

ARTICLE VIII. HEARSAY

Rule 801. Definitions.

The following definitions apply under this article.

(a) *Statement* A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant* A "declarant" is a person who makes a statement.

(c) *Hearsay* "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Statements which are not hearsay* A statement is not hearsay if

(1) *Prior statement by witness* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony or the witness denies having made the statement or has forgotten or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person, or

(2) *Admission by party opponent* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Rule 802. Hearsay rule.

Hearsay is not admissible except as provided by law or by these rules.

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) *Present sense impression* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(2) *Excited utterance* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) *Then existing mental, emotional, or physical condition* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) *Statements for purposes of medical diagnosis or treatment* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) *Recorded recollection* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Records of regularly conducted activity* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) *Absence of entry in records kept in accordance with the provisions of paragraph (6)* Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of Paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) *Public records and reports* Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) *Records of vital statistics* Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) *Absence of public record or entry* To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of

which a record, report, statement, or data compilation in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry

(11) *Records of religious organization* Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization

(12) *Marriage, baptismal, and similar certificates* Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter

(13) *Family records* Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like

(14) *Records of documents affecting an interest in property* The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office

(15) *Statements in documents affecting an interest in property* A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document

(16) *Statements in ancient documents* Statements in a document in existence twenty years or more the authenticity of which is established

(17) *Market reports commercial publications* Market quotations tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations

(18) *Learned treatises* To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits

(19) *Reputation concerning personal or family history* Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history

(20) *Reputation concerning boundaries or general history* Reputation in a community arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located

(21) *Reputation as to character* Reputation of a person's character among associates or in the community

(22) *Judgment of previous conviction* Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility

(23) *Judgment as to personal, family or general history, or boundaries* Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation

(24) *Other exceptions* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant

Rule 804. Hearsay exceptions; declarant unavailable.

(a) *Definition of unavailability* "Unavailability as a witness" includes situations in which the declarant

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement, or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so, or

(3) testifies to a lack of memory of the subject matter of the declarant's statement, or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means

A declarant is not unavailable as a witness if the exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying

(b) *Hearsay exceptions* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness

(1) *Former testimony* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination

(2) *Statement under belief of impending death* In a civil or criminal action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, if the judge finds it was made in good faith

(3) *Statement against interest* A statement which was at the time of its making so far contrary to the declarant's

Tab 3

**TRIAL COURT
FINDINGS OF FACT
AND CONCLUSIONS
OF LAW;
JUDGMENT AND
DECREE**

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heard the arguments of Plaintiff's counsel and being fully advised in the premises, now makes and enters the following:

FINDINGS OF FACT

1. Plaintiff resides near Cornish, Cache County, Utah.
2. The Defendants are residents of Clarkston, Cache County, Utah.
3. The property subject of this action is situated in Section 12, Township 14 North, Range 2 West, Salt Lake Base and Meridian (the Section 12 Property) and in Section 18, Township 14 North, Range 1 West, Salt Lake Base and Meridian (the Section 18 Property).
4. The Defendant, Burke's Utah Land and Livestock, LLC, is the owner of the East Half of the Northeast Quarter and the North Half of the Southeast Quarter of the Section 12 Property (the Godfrey Section 12 Property).
5. Plaintiff is the owner of the Southeast Quarter of the Southeast Quarter of the Section 12 Property (the Koller Section 12 Property).
6. On March 29, 1991 the Utah State Water Engineer granted an application of Plaintiff to develop a spring situated on the Northeast Quarter of the Southeast Quarter of the Section 12 Property (the Spring). In pursuit of access to the Spring for the purpose of developing the same, Plaintiff filed this action to, among other things, condemn an easement on the property wherein the Spring is situated, and to obtain an order of this Court granting Plaintiff the right to come upon said property of Godfrey to develop the Spring. This Court granted Plaintiff an order of occupancy to develop the Spring. Development of the Spring was completed in approximately October of 1992.
7. The area reasonably required to develop the Spring is 900 feet North and South and 600 feet East and West (the Spring Area) and is particularly described as follows:

Beginning 595 feet West of the railroad post located at the Section 12 16th corner point on the East side of the adjoining Koller and Godfrey properties in Section 12, Township 14 North, Range 2 West, Salt Lake Meridian, thence North 900 feet, thence West 600 feet, thence South 900 feet, thence East 600 feet along the Koller/Godfrey Section 12 boundary to beginning.

8. The use to which the Spring Area is to be applied by Plaintiff is a use authorized by law.

9. The taking of an easement on the Spring Area by Plaintiff is necessary to Plaintiff's development, use and maintenance of the Spring.

10. The construction of the collection and piping system used to develop the Spring in the Spring Area commenced and was completed by Plaintiff within a reasonable time after Plaintiff initiated this action.

11. The Spring has not been applied to any public use other than Plaintiff's use.

12. Plaintiff does not require the fee simple title to the Spring Area in order to develop the Spring or to beneficially use the water from the Spring but rather requires only an easement on the Spring Area for such development, use and maintenance upon the payment of damages for any injury to the surface of the Spring Area resulting from the installation and maintenance of the paraphernalia installed to develop the Spring and to transfer water from the Spring across the property of Defendant. Defendant should retain the surface rights to the Spring Area. The easement for Plaintiff to use the Spring Area to develop the Spring should expire in the event the Plaintiff fails to make the necessary proof to the Utah State Water Engineer to perfect the water rights granted to Plaintiff in the Spring or in the event Plaintiff's water rights in the Spring are perfected and thereafter lost by the Plaintiff or his successors in ownership for any reason.

13. Defendants have waived compensation for surface damage to the Spring Area caused by Plaintiff in his development of the Spring. Such waiver does not include the waiver of any damage to

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the surface of the Spring Area which may be caused by Plaintiff or his successors hereafter.

14. The air relief valve installed by Plaintiff on the Spring Area in connection with Plaintiff's development of the Spring unnecessarily injures Defendants and should and can be removed from Godfrey's Section 12 Property.

15. Shirleen T. Clark, Beth T. Williams, Venna T. Godfrey and Glen Norman Thompson are the owners of the Southwest Quarter of the Southeast Quarter of the Section 12 Property (the Clark Property). Shirleen T. Clark, Beth T. Williams, Venna T. Godfrey and Glen Norman Thompson are the children of Glen Thompson who owned the Clark Section 12 Property prior to Shirleen T. Clark, Beth T. Williams, Venna T. Godfrey and Glen Norman Thompson.

16. Koller acquired title to the Koller Section 12 Property and the Koller Section 18 Property by a Warranty Deed from Lillie B. Thompson, a copy of which was introduced and received into evidence as Plaintiff's Exhibit No. 101 (the Thompson-Koller Deed). The Thompson-Koller Deed makes no reference to easements or rights of way.

17. Lillie B. Thompson acquired title to the Koller Section 12 and Section 18 Property by a Decree of Distribution in the Matter of the Estate of Wendell Thompson, the husband of Lillie B. Thompson. A copy of the Decree of Distribution in the Matter of the Estate of Wendell Thompson was introduced and received into evidence as Defendant's Exhibit No. 20 (the Wendell Thompson Decree). The Wendell Thompson Decree makes no mention of or reference to any easement or right-of-way.

18. Wendell Thompson acquired title to the Koller Section 12 and Section 18 Property by Warranty Deed from Kenneth Thompson and Peru Thompson, a copy of which was introduced and received into evidence as Defendant's Exhibit No. 21 (the Kenneth Thompson/Wendell Thompson Deed).

19. The Kenneth Thompson/Wendell Thompson Deed provides on its face that:

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"It is the intent of this conveyance also to convey to the Grantee all of the right which the Grantors have or claim in and to a certain spring, its pipeline, all rights-of-way used in connection therewith, together with all rights used in connection with said spring, also to convey to the Grantee all of the right, title and interest of Grantors to a steel watering trough used to collect said water and to facilitate its use, said watering trough being situated in the Northwest Corner of the Southeast Quarter of the Southeast Quarter of said Section 12."

20. The Kenneth Thompson/Wendell Thompson Deed makes no reference to an easement for ingress and egress across the Godfrey Property and Plaintiff produced no evidence at trial to indicate that the rights-of-way referred to in the Kenneth Thompson/Wendell Thompson Deed referred to Plaintiff's claimed easement for ingress and egress across the Godfrey Section 12 Property.

21. A copy of a Quit Claim Deed from Kenneth Thompson and Peru Thompson, his wife, to Glen W. Thompson was introduced into evidence as Plaintiff's Exhibit No. 13. Said Quit Claim Deed conveys:

"The right to water livestock consisting principally of work animals at a steel watering trough situated in the Northwest Corner of the Southeast Quarter of the Southeast Quarter of Section 12, Township 14 North, Range 2 West of the Salt Lake Base and Meridian; together with the right of ingress and egress to said steel watering trough for the purpose of carrying the right hereby conveyed into effect. It being understood and agreed that this right is not exclusive, but is to be exercised in connection with similar rights of other parties and subject to reasonable care to avoid unnecessary interference with the rights of other parties to a like service."

This Quit Claim Deed makes no reference to an easement for ingress and egress across the Godfrey Section 12 Property and no evidence was presented by Plaintiff to show that the rights conveyed thereby made any reference to Plaintiffs' claimed easement for ingress and egress across the Godfrey Section 12 Property.

22. For more than eighty (80) years last past there has been a marker at Point C on Defendants' Exhibit No. 1 in the form of a

railroad tie imbedded vertically in the ground approximately three feet (3') and protruding from the ground approximately five feet (5'). This railroad tie marks the Northeast Corner of the Koller Section 12 Property and the Southeast Corner of the Godfrey Section 12 Property.

23. At Point B on Defendants' Exhibit No. 1, there historically existed a steel watering trough which is shown on Plaintiff's Exhibit No.'s 229, 230, 231 and 233 (the trough) in such a way so as to enable horses owned by Godfrey's predecessor's in interest to water therefrom, for horses owned by Koller's predecessor's in interest to water therefrom and for horses owned by Clark's predecessor's in interest to water therefrom.

24. The trough was situated in the Northwest Corner of the Koller Section 12 Property, the Northeast Corner of the Clark Property and on the Godfrey Section 12 Property.

25. There is a square pipe imbedded in the ground at approximately Point A on Defendants' Exhibit No. 1. This square pipe replaced a wooden post in the exact same location and the post and pipe in succession have been in the present location of the square pipe for more than eight (80) years last past.

26. The square pipe at Point A on Defendant's Exhibit No. 1 marks the recognized boundary between the Northwest Corner of the Clark Property and the Southwest Corner of the Godfrey Section 12 Property.

27. There historically existed a fence from Point A through Point B to Point C on Defendants' Exhibit No. 1. Said fence existed from more than eighty (80) years ago up to the time when it was gradually and piece by piece removed by the owners of the property on either side thereof. Said fence will be hereinafter referred to as the ABC Fence.

28. The ABC Fence extended over approximately the middle going North and South of the trough at a point on the South side of the old grain drill on the East and North side of the trough as shown on Plaintiff's Exhibit No.'s 229, 230, 231 and 233.

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29. Kollers and Clarks and their respective predecessors in ownership and interest of the Clark and Koller Properties cultivated up to the ABC Fence on the North and Godfreys and their predecessor in interest cultivated up to the ABC Fence on the South of the Godfrey Property and Godfreys and their predecessors in interest and Kollers and Clarks and their predecessors in interest recognized and treated the ABC Fence as the boundary line between their respective properties from more than eighty (80) years ago until the dispute giving rise to this action came about.

30. The Court finds that the ABC Fence line marks the historical and recognized boundary between the Godfrey Section 12 Property on the North and the Koller Section 12 and Clark Property on the South.

31. The legal description ABC Fence line was established by a survey made by Hansen and Associates, Inc. on April 20, 1995 which survey was introduced and received into evidence as Defendants' Exhibit No. 2. The ABC Fence line is legally described as follows:

Fence Line

A line projected through two fence post, a rail road tie post at the East end and a square pipe at the West end, shown to us in the field by Burke Godfrey. Said line described as follows:

Beginning at a point located North 00°10'32" East along the center of Section line as currently monumented 1300.82 feet from the aluminum cap monument found at the South Quarter Corner of Section 12, Township 14 North, Range 2 West, of the Salt Lake Base and Meridian; and running thence North 89°37'37" East through two fence post 2660.11 feet to the East line of said Section.

32. In addition, the Court finds that Defendant, F. Burke Godfrey, the Plaintiff, Randy Bott (Bott) a Utah licensed surveyor and his assistant Don Williams (Williams), met on the Section 12 Property "eight (8) or nine (9) years ago" and prior to December 26, 1989; that Bott, Plaintiff and F. Burke Godfrey met at the point where the railroad tie is situated at Point C on Defendants'

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Exhibit No. 1 and there, with a surveying instrument belonging to and provided by Bott, sited a line from said railroad tie straight to the square pipe located at Point A on the ABC Fence line where Williams was holding a siting stick and that Plaintiff and F. Burke Godfrey then and there agreed that the ABC Fence line as cited by Bott and observed by Plaintiff and F. Burke Godfrey would be the boundary line between Godfrey's Section 12 Property and Koller's Section 12 Property. Glen ^{Thompson} ~~Godfrey~~, who was the owner of the Clark Property at the time his deposition was taken on February 17, 1993, stated in his deposition that the A and B line on Defendants' Exhibit No. 1 was the boundary line between the Clark Property on the South and the Northwest Quarter of the Southeast Quarter of the Section 12 Property on the North.

33. The Court finds that the agreement referred to in Finding No. 32 above is cumulative to the establishment of the ABC Fence line as the boundary between the Godfrey Section 12 Property on the North and the Koller Section 12 and Clark Properties on the South and that the evidence conclusively established the ABC Fence line as such boundary line independent of the agreement made by Godfrey and Koller at the meeting referred to in Finding of Fact No. 32.

34. The steel post with flags attached to them shown on Plaintiff's Exhibits 229, 230, 231, 232, and 233 and the telephone pole shown on Plaintiff's Exhibit 235 are not on the ABC Fence line, were not placed as shown on said Exhibits in the presence of any of the Defendants and do not mark or define the location of the ABC Fence line.

35. The boundaries established by the ABC Fence line on Defendants' Exhibit No. 1 between the Godfrey Section 12 Property and the property of Plaintiff in Section 7, Township 14 North, Range 1 West, Salt Lake Meridian, should be marked by telephone poles to be set by the Defendants at the following points:

A. Immediately South of the Northeast corner of Section 12, Township 14 North, Range 2 West, Salt Lake Meridian.

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B. At the exact point where the railroad tie at Point C on Defendants' Exhibit No. 2 is presently situated.

C. At some points between the telephone poles provided in A. and B. above so that the boundary line between those two (2) telephone poles can be sited from pole to pole.

D. Adjoining on the North of the square pipe at Point A on Defendants' Exhibit No. 2.

E. Somewhere along the ABC Fence line at Defendants' election.

36. Defendants should be allowed to use the telephone pole belonging to Plaintiff and situated at approximately Point B on Defendants' Exhibit No. 1 as one of the telephone poles to be set pursuant to Finding No. 35.

37. Koller has claimed a prescriptive easement or right-of-way by prescription or otherwise over the Godfrey Section 12 Property immediately North of the ABC Fence line.

38. Koller has failed to show by a preponderance of the evidence or at all the existence of such claimed prescriptive easement and the Court finds that Koller has no prescriptive or other kind of easement across the Godfrey Section 12 Property.

39. Prior to the time that Koller acquired the Wendell Thompson Property in Section 18 Property, there was evidence of travel along the West boundary of the Godfrey Section 18 Property between Points G and E shown on Defendants' Exhibit 1.

40. Koller acquired the Koller Section 18 Property in 1967.

41. Godfrey's predecessor in ownership of the Godfrey Section 18 Property was Don Anderson (Anderson).

42. Within two (2) years after Koller acquired the Koller Section 18 Property, Anderson began cultivating up to the West line of the Godfrey Section 18 Property and obliterated any evidence of travel across the West boundary of the Godfrey Section 18 Property and has cultivated up to that line continuously every year until Godfrey acquired the property from Anderson and Godfrey has

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cultivated up to the West line of the Godfrey Section 18 Property each and every year since Godfrey acquired the Godfrey Section 18 Property up to the present time.

43. Koller has produced no evidence to establish the basis on which evidence of travel along the West portion of the Godfrey Section 18 Property occurred or was used prior to the time Koller acquired his Section 18 Property. There is no evidence before the Court that there was any deeded, prescriptive or Cache County right to any easement along the G-F line on Defendants' Exhibit No. 1 across the Godfrey Section 18 Property prior to the time that Koller acquired Koller's Section 18 Property.

44. Koller has failed to establish by preponderance of the evidence or at all that he or those acting under him have established a prescriptive easement by continuous open and adverse use under a claim of right for the prescriptive period over the western portion of Godfrey's Section 18 Property between Points F and G on Defendants' Exhibit No. 1.

45. There are common boundaries between the Koller Section 12 Property and the Godfrey Section 12 Property and between the Godfrey Section 12 Property and property owned by Koller in Section 7, Township 14 North, Range 1 West. These boundaries are shown by a blue marker on Defendants' Exhibit No. 1. In addition, there is a common boundary between the Koller Section 18 Property and the Godfrey Section 18 Property as marked in blue on Defendants' Exhibit No. 1 and between other Koller property and property not owned but being operated by Godfrey.

46. Koller has encroached upon various properties owned and/or being operated by Godfrey with chemical spray which has damaged crops owned by Godfrey.

47. Godfreys have waived their claims of damages prior to the trial of this case for such encroachment and crop destruction.

48. The encroachment by Koller is without right and the Court finds that Koller and Godfrey each should be restrained from encroaching upon property of the other by spraying, physical trespass or any other means whatever.

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49. Defendants have not defended Plaintiff's claim nor pursued any of their claims herein in bad faith.

50. Plaintiff is not entitled to any damages against Defendants or any of them.

From the foregoing Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. A decree should enter granting Plaintiff an easement on the Spring Area as described in Findings of Fact No. 7, for the purpose of developing and maintaining the drains, collection facilities and water lines installed by Plaintiff in connection with the development of the Spring.

2. A decree should enter that Defendants have and retain the surface rights to the Spring Area.

3. A decree should enter that the easement granted by the Court to develop the Spring will expire in the event Plaintiff fails to make the necessary proof to the Utah State Water Engineer to perfect the water rights granted to the Plaintiff in the Spring or in the event Plaintiff's water rights in the Spring are perfected and thereafter lost by the Plaintiff or his successor in ownership for any reason.

4. Based upon Defendants' waiver of compensation for surface damage to the Spring Area by Plaintiff while installing a collection system and line to convey water from the Spring to the Property of Plaintiff, a decree should enter that Defendants receive no damage for Plaintiff's prior actions in development of the Spring Area.

5. A decree should enter that Defendants' waiver of damages to the surface of the Spring Area during and as a result of Plaintiff's development of the Spring in the year 1992 does not waive any damage which may be caused by Plaintiff or his successors hereafter and that Defendants and their successors shall have the

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right to be compensated for any damages resulting to the surface of the Spring Area as a result of the acts by Plaintiff, his successors and/or those acting under Plaintiff or his successors hereafter.

6. A decree should enter ordering Plaintiff to remove the air relief valve from the Defendants' property.

7. A decree should enter that the ABC Fence line particularly described by meets and bounds in paragraph 31 of the foregoing Findings of Fact is the boundary line between the Godfrey Section 12 Property on the North and the Koller Section 12 Properties and the Clark Property on the South.

8. A decree should enter requiring Defendants to mark the boundaries between the Godfrey Section 12 Property and the property of Plaintiff in Section 7, Township 14 North, Range 1 West, Salt Lake Meridian, as provided in paragraph 35 of the foregoing Findings of Fact.

9. A decree should enter that Plaintiff has no easement either by prescriptive use or deed over the Godfrey Section 12 Property.

10. A decree should enter permanently enjoining and restraining Koller and any claiming by, under or through him from traveling by any means across the Godfrey Section 12 Property other than for the purposes of developing and maintaining improvements in connection with Plaintiff's development of the Spring and then limited specifically to the Spring Area.

11. A decree should enter that Koller has no easement by deed or prescription across the Godfrey Section 18 Property.

12. A decree should enter permanently in restraining and enjoining Plaintiff and all claiming by, under and through Plaintiff from traveling by any means across the Godfrey Section 18 Property.

13. A decree should enter enjoining and restraining each of the parties from encroaching upon the properties owned or being operated by the other by spraying, physical trespass or any other means whatever.

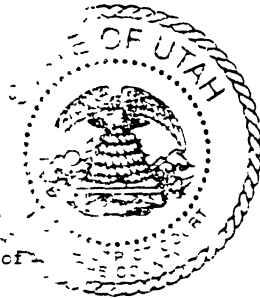
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14. A decree should enter that Defendants defense of Plaintiff's claim or pursuit of any of their claims herein were not taken or maintained in bad faith.

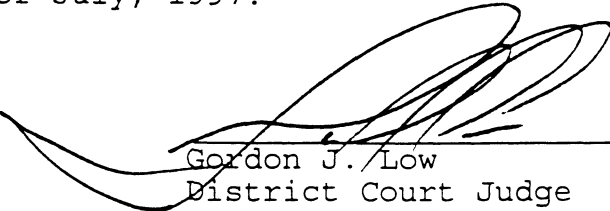
15. A decree should enter that the Plaintiff is not entitled to any damage against Defendants or either of them.

Let judgment enter accordingly.

DATED this 14th day of July, 1997.



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Gordon J. Low
District Court Judge

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

EVAN O. KOLLER,)
)
Plaintiff,) JUDGMENT AND DECREE
)
vs.)
)
F. BURKE GODFREY, B. LAMONT)
GODFREY and BURKE'S UTAH LAND)
AND LIVESTOCK, LLC, a Utah)
Limited Liability Company,)
) Civil No. 92-118
Defendants.)

This matter came on for trial on the 22nd and 23rd days of May, 1997 in the District Courtroom in Logan, Cache County, Utah, the Honorable Judge Gordon J. Low presiding. The Plaintiff was present in person and was represented by his Attorney, Raymond N. Malouf. The Defendants were present in person and were represented by their Attorneys, Olson & Hoggan, P.C., L. Brent Hoggan. Witnesses were sworn and testified. Glen Thompson, whose deposition was taken on February 17, 1993 was not available for health reasons to testify at the trial. The deposition of Glen Thompson taken February 17, 1993 was published and accepted as evidence on motion of Plaintiff and was read by the Trial Judge prior to his bench ruling in this case. Documentary evidence was presented, the matter was argued by counsel for the Plaintiff and the Court having heard the testimony, having read the deposition of Glen Thompson, having examined the physical evidence and having

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ROLL NUMBER: 71

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heard the arguments of Plaintiff's counsel, and being fully advised in the premises, and the Court having heretofore made and entered its Findings of Fact and Conclusions of Law, now makes and enters the following:

JUDGMENT AND DECREE

It is hereby Ordered, Adjudged and Decreed as follows:

1. That Plaintiff be and is hereby granted an easement on the Spring Area described as follows:

Beginning 595 feet West of the railroad post located at the Section 12 16th corner point on the East side of the adjoining Koller and Godfrey properties in Section 12, Township 14 North, Range 2 West, Salt Lake Meridian, thence North 900 feet, thence West 600 feet, thence South 900 feet, thence East 600 feet along the Koller/Godfrey Section 12 boundary to beginning.

for the purpose of developing the drains, collection facilities and water lines installed by Plaintiff in connection with development of said Spring on said Spring Area.

2. That Defendants shall have and retain the surface rights to the Spring Area shown on Plaintiff's Exhibit 1.

3. The easement granted to Plaintiff pursuant to paragraph 1 above will expire in the event Plaintiff fails to make the necessary proof to the Utah State Water Engineer to perfect the water rights granted to the Plaintiff in the Spring on the Northeast Quarter of the Southeast Quarter of Section 12, Township 2 West, Range 14 North, Salt Lake Base and Meridian, or in the event Plaintiff's water rights in said Spring are perfected and thereafter lost by the Plaintiff or his successor in ownership for any reason.

4. Based upon Defendant's waiver of compensation for surface damage to the Spring Area by Plaintiff while installing a collecting system and line to convey water from said Spring to the Property of Plaintiff, it is ordered that Defendants receive no damage prior to the date of this Decree for Plaintiff's development of the Spring in said Spring Area.

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5. The prohibition provided in paragraph 4 hereof shall not constitute a waiver of Defendants' right to damages to the surface of said Spring Area hereafter and that Defendants and their successors in interest shall have the right to be compensated for any damages resulting to the surface of said Spring Area as a result of the acts of Plaintiff or his successors and those acting under the Plaintiff or his successors hereafter.

6. Plaintiff is ordered to forthwith remove the air relief valve installed by him on Defendants' property in the Northeast Quarter of the Southeast Quarter of Section 12, Township 2 West, Range 14 North, Salt Lake Base and Meridian.

7. The following described line:

Fence Line

A line projected through two fence post, a rail road tie post at the East end and a square pipe at the West end, shown to us in the field by Burke Godfrey. Said line described as follows:

Beginning at a point located North 00°10'32" East along the center of Section line as currently monumented 1300.82 feet from the aluminum cap monument found at the South Quarter Corner of Section 12, Township 14 North, Range 2 West, of the Salt Lake Base and Meridian; and running thence North 89°37'37" East through two fence post 2660.11 feet to the East line of said Section.

shall be and is hereby fixed as the boundary line between the North Half of the Southeast Quarter of Section 12, Township 2 West, Range 14 North, Salt Lake Base and Meridian, and the North line of the South Half of the Northeast Quarter of Section 12, Township 2 West, Range 14 North, Salt Lake Base and Meridian.

8. Defendants are ordered to mark the boundary lines established pursuant to paragraph 7 above by telephone poles installed as follows:

A. At the West terminus of said division line.

B. At the East end of said division line.

C. At such locations along said division line as Defendants may elect.

In addition, Defendants are ordered to mark the boundary line between property belonging to Burke's Utah Land and Livestock, LLC in Section 12, Township 2 West, Range 14 North, Salt Lake Base and Meridian and the property of Plaintiff in Section 7, Township 1 West, Range 14, Salt Lake Base and Meridian by telephone poles installed as follows:

D. Immediately South of the Northeast corner of Section 12, Township 14 North, Range 2 West, Salt Lake Meridian.

E. At some point between the telephone poles provided in paragraph 8.B. and D. above so that the boundary line between those two (2) telephone poles can be sited from point to point.

9. That Defendants be and are allowed to use the telephone pole situated at approximately Point B on Defendants' Exhibit No. 1 and shown on Plaintiff's Exhibits 235 and 237 as one of the poles to be set pursuant to subparagraphs A. and B. of paragraph 8 of this Judgment and Decree.

10. That Plaintiff and those claiming by, under or through Plaintiff have no prescriptive easement across property belonging to the Defendants in Section 12, Township 14 North, Range 2 West of the Salt Lake Base and Meridian.

11. That Plaintiff and those claiming by, under or through Plaintiff are hereby perpetually and permanently enjoined and restrained from traveling by any means across the property of Defendants in Section 12 other than for the purpose of developing and maintaining improvements on the Spring Area as defined in this Judgment and Decree and then only upon said Spring Area.

12. That Plaintiff has no easement by deed or prescription across the following described property belonging to Burke's Utah Land and Livestock, LLC:

The Southwest Quarter and the Northwest Quarter of the Southeast Quarter of Section 18, Township 14 North, Range 1 West, Salt Lake Base and Meridian. (The Godfrey Section 18 Property).

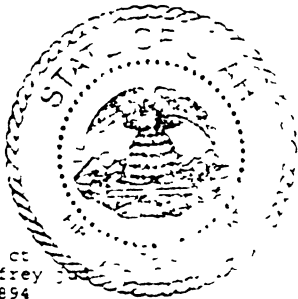
13. Plaintiff and all claiming by, under and through Plaintiff are perpetually and permanently enjoined and restrained from coming upon and/or traveling by any means across the Godfrey Section 18 Property.

14. Each of the Plaintiff and the Defendants are enjoined and restrained from encroaching on the properties owned or being operated by the other by spraying, physical trespassing, or any other means whatever.

15. Defendants defense of Plaintiff's claims and pursuit of Defendants' claims herein were not taken, initiated or maintained in bad faith.

16. That Plaintiff is not entitled to any damages against Defendants or either of them.

DATED this 14th day of July, 1997.



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godfrey
N-4894

Gordon J. Low
District Court Judge